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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**DECISION**  
Case #: FCP - 201176

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**PRELIMINARY RECITALS**

Pursuant to a petition filed on February 5, 2021, under Wis. Admin. Code § DHS 10.55, to review a decision by the MY Choice Family Care regarding Medical Assistance (MA), a hearing was held on March 10, 2021, by telephone.

The issue for determination is whether the MCO failed to provide a second caregiver to Petitioner after the MCO affirmed (through its internal mediation process by the Grievance and Appeals Committee) that Petitioner does require a second caregiver.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

By: [REDACTED]  
MY Choice Family Care  
10201 Innovation Dr, Suite 100  
Wauwatosa, WI 53226

**ADMINISTRATIVE LAW JUDGE:**

Nicole Bjork  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County and has progressive dementia and Alzheimer's disease. Petitioner is no longer ambulatory.
2. On September 3, 2019, Petitioner relocated to [REDACTED] where she has resided since.
3. In November 2020, Petitioner's condition worsened and, as a result, Petitioner requested an additional caregiver for transferring and bathing. The MCO applied the Resource Allocation Decision (RAD) method to make a determination on the request, which was completed on December 10, 2020.
4. On December 10, 2020, the MCO sent a notice to Petitioner informing her that her request for a second caregiver was denied because the MCO found that Petitioner's needs could be met at her current facility or with a different placement at a community based residential facility (CBRF).
5. Petitioner appealed the December 10, 2020 notice with the MCO's internal grievance committee. The internal appeal was filed on December 22, 2020 and a hearing was held on January 13, 2021.
6. On January 13, 2020, the Grievance and Appeals Committee sent Petitioner a notice informing her that the committee had overturned the denial of a second caregiver. The notice stated in part, "The My Choice Wisconsin Grievance and Appeal committee has reached a decision on your appeal about the denial of an additional caregiver. The hearing was held on Wednesday, January 13, 2021 where you participated via phone. The Grievance and Appeal Committee carefully reviewed the decision and the information you provided at the hearing. We have decided to overturn the team's original decision. The Committee feels (Petitioner) is in need of 2 caregivers and aging in place is the most effective means of meeting her outcome. This decision is based on the Wisconsin law governing Family Care, Wis. Admin. Code § DHS 10.44(2)-(3). Thank you for using our grievance and appeals process. Your care team will be contacting you within 72 hours to implement this decision."
7. Petitioner's daughter testified that no one contacted Petitioner within 72 hours to discuss how the decision would be implemented. On January 22, 2021, Petitioner's daughter contacted the MCO to ask how the second caregiver determination would be implemented since her mother had not received any information and it had been over a week.
8. On January 22, 2021, the MCO responded to Petitioner's daughter's request for details by emailing Petitioner's daughter an "Amended Appeal Decision." That decision stated, "The purpose of this letter is to clarify the appeal decision letter written and sent to you on January 13<sup>th</sup>, 2021. The language in that letter was too vague and didn't provide enough detail to clearly explain the committee's decision." The decision further went on to note, "The Committee also feels (Petitioner) is in need of 2 caregivers for these tasks and aging in place is the most effective means of meeting her outcome. Currently, your Mom has additional support from Hospice, which can provide caregivers to assist with bathing. Hospice staff, in addition to the AFH staff, will provide the two caregivers needed. Transfers can also be done when the Hospice staff are there to ensure two caregivers are available. As a result, your mom's need for two caregivers can be effectively met with the combination of staff at the AFH and Hospice staff."
9. Petitioner appealed the "Amended Appeal Decision," noting that it did not follow the appeal protocol as the letter did not come from the committee after the hearing, rather it was provided to Petitioner's daughter after she sought enforcement of the Grievance and Appeals Committee's decision to provide a second caregiver. Further, Petitioner noted that while the language indicates the committee is still overturning the denial, the explanation provided essentially affirms the original denial by maintaining that Petitioner already has sufficient support.

## DISCUSSION

Family Care (FC) is a Medical Assistance funded program intended to meet the long term care and health care needs of target groups consisting of frail elders; individuals age 18 and older who have physical disabilities, as defined in Wis. Stat. §15.197 (4) (a) 2.; and individuals age 18 and older who have developmental disabilities, as defined in Wis. Stat. §51.01 (5) (a). FC is administered by the Department of Health Services (DHS). DHS contracts with several managed care organizations (MCOs) throughout the state to provide case management which includes the development of individual service plans (ISPs) and the authorization of allowable and appropriate long term care services for individual FC recipients. Wis. Admin. Code §DHS 10.44(f). The ISP must reasonably and effectively address all of the FC recipient's long-term needs and outcomes, assist the recipient to be as self-reliant and autonomous as possible, and be cost effective when compared to alternative services or supports that could meet the same needs and achieve similar outcomes. Id.

MCOs are directed to determine appropriate services through the a "member-centered planning process" and, more specifically, by applying the "Resource Allocation Decision" (RAD) method. Id. at Article V, Sec. K; see also OFCE Memo, Issued 6/26/2013 available online at: <https://www.dhs.wisconsin.gov/familycare/mcos/communication/ta13-02.pdf>. MCOs may develop service authorization guidelines for use with the RAD but such guidelines must be approved by the department. FC Contract, Article V., Sec. K.1.a. Regardless of the particular service authorization policy utilized, the Family Care Contract prohibits an MCO from denying "services that are necessary to reasonably and effectively support the member's long term care outcomes identified in the comprehensive assessment as well as those necessary to assist the member to be as self-reliant and autonomous as possible." Id. at Article V., Sec. K.2.a.

In this case, Petitioner's medical conditions deteriorated and she sought approval for a second caregiver to assist her with bathing and transferring. The MCO denied that request, noting that Petitioner's needs could be met with assistance from others at her current residence or by moving Petitioner to a CBRF. Petitioner appealed that determination with the MCO's internal process. Per Wis. Admin. Code §DHS 10.54, a participant is allowed to file a local grievance prior to filing an appeal with the Division of Hearings and Appeals. In this case, the Grievance and Appeals Committee overturned the denial of a second caregiver. The Grievance and Appeals Committee held a hearing and was provided with all of the applicable evidence. That committee specifically found that Petitioner does require a second caregiver and that Petitioner should stay at her current facility in order to meet her needs. The notice provided to Petitioner further states that Petitioner would be contacted within 72 hours with details regarding how the decision would be implemented. Petitioner never received that contact.

Instead, after more than a week, Petitioner's daughter contacted the MCO to find out what the next steps were to obtain a second caregiver for her mother since all parties agreed that that was necessary. Instead of receiving that plan for a second caregiver, the MCO emailed a new notice to Petitioner, entitled, "Amended Appeal Decision," which informed Petitioner that while the MCO does find Petitioner requires a second caregiver, she can obtain that assistance through hospice workers or other caregivers already present at the facility. The notice further states that the "Amended" notice does not change the outcome of the original Grievance and Appeals Committee decision because both decisions find Petitioner requires a second caregiver. However, despite that language, the "Amended" decision is a complete reversal from the original committee determination. The reason an appeal was filed in the first place was because the MCO found Petitioner could be using caregivers already present. Petitioner disagreed and successfully demonstrated with evidence at the Grievance and Appeals Committee hearing that using the caregivers already present was not a solution and that a second dedicated caregiver was necessary. The Grievance and Appeals Committee agreed and specifically noted that Petitioner required a second caregiver and that

she should not be moved from her current facility given her condition. The MCO was then required to implement that plan within 72 hours but did not.

Instead, an amended decision letter was provided. This letter was not provided to Petitioner within 30 days of the request, as set by CFR 422.590. The initial request was submitted to the Member Rights Specialist on December 22, 2020. Furthermore, the evidence does not indicate who exactly created the amended decision. It is unknown if the amended decision was created by all of the same individuals that participated in the hearing and heard the information and testimony provided. The evidence indicates that the same individuals did not create the amended decision as it would be a reversal on their initial determination.

As noted by the Grievance and Appeals Committee in its initial determination, Petitioner in this case does require a second caregiver. Neither party disputes the necessity of a second caregiver. However, the MCO now argues that Petitioner can simply use a hospice worker or another caregiver when she requires assistance. That argument did not hold up during the Grievance and Appeals Committee hearing, nor does it hold up now. Multiple caregivers for Petitioner testified on her behalf and noted that hospice cannot be used in this manner. Hospice care workers cannot be scheduled for a set time to perform tasks and while it may happen to work out occasionally, that is not an effective solution for Petitioner. Petitioner requires consistent care.

The MCO further discussed moving Petitioner to another facility. Again, that idea was already rejected by the Grievance and Appeals Committee as not appropriate for Petitioner. An MCO representative testified regarding a recent visit she conducted to Petitioner's current facility and she expressed concerns regarding Petitioner's ability to evacuate in emergency situations. This information is new and did not exist when the original decision was made to deny a second caregiver. Therefore, that information is not relevant to the issue in this matter. Rather, all evidence indicates Petitioner should stay at her current facility, as noted by the Grievance and Appeals Committee.

All evidence presented indicates that Petitioner requires a second caregiver (not disputed by either party) and that she should stay at her current facility (also a determination confirmed by the MCO's own Grievance and Appeals Committee). Therefore, the Grievance and Appeals Committee's initial determination is upheld and the MCO should provide a second caregiver to Petitioner. Nothing in this decision prevents the MCO from making a *new determination* based on more recent evidence and providing appeal rights with any new determination.

### CONCLUSIONS OF LAW

Petitioner requires a second caregiver and should stay in her current facility, as noted by MY Choice Family Care's Grievance and Appeals Committee in its decision notice dated January 13, 2021.

**THEREFORE, it is**

**ORDERED**

That within 10 days of the date of this decision, MY Choice Family Care will implement as second caregiver for Petitioner as detailed in the January 13, 2020 decision by MY Choice Family Care's Grievance and Appeals Committee.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way 5<sup>th</sup> Floor, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

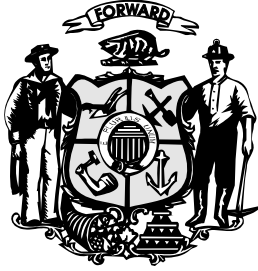
## **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 26th day of April, 2021

\s \_\_\_\_\_  
Nicole Bjork  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on April 26, 2021.

MY Choice Family Care  
Office of Family Care Expansion  
Health Care Access and Accountability